Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARSHALL SPIEGEL *and* CAROL SPIEGEL,

Petitioners,

v.

HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION *and*
RAYMOND J., BONITA, & M. DES ROSIERS

Respondents.

On Petition For Writ of Certiorari To
The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

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QUESTION PRESENTED

Whether a violation of the Fourteenth Amendment Due Process Clause has occurred where a condominium association orders tenants to vacate their apartment, and a state court in subsequent eviction proceedings summarily denies the tenants an opportunity to be heard because the tenants are "bound by the determination of the Association."

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Marshall Spiegel and Carol Spiegel (the Spiegels) petition for a writ of *certiorari* to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The modified opinion of the Illinois court of appeals is reported at 671 N.E.2d 350 (Ill. App. Ct. 1996) and reprinted in the Appendix at 1a. The orders of the Illinois Supreme Court denying Petitioners' petitions for leave to appeal are unpublished, but are reprinted in the Appendix at 15a and 16a.

JURISDICTION

On October 2, 1996, the Illinois court of appeals entered an Order ("October 2 Order") denying the Spiegels' petition for rehearing of that court's adverse ruling. Rehearing was denied "upon the filing of a modified opinion, which will occur on October 8, 1996." On December 4, 1996, the Illinois Supreme Court denied a petition for leave to appeal (the "First PLA"), which the Spiegels had filed on May 20, 1996. The Spiegels thereafter filed a motion to stay the mandate pending their filing of a petition for *certiorari* to this Court. The Illinois Supreme Court granted the motion to stay on December 31, 1996. The Spiegels' time for filing a petition for *certiorari* in this Court, as calculated from the December 4, 1996 denial of the First PLA, would have originally expired on March 4, 1997. On February 25, 1997, Justice Stevens extended the time for filing a petition for writ of *certiorari* to April 18; on April 16, he further extended that deadline to and including May 2, 1997.

On October 8, 1996, the Illinois court of appeals issued its "modified opinion." In response to the modified opinion, the Spiegels filed a second petition for rehearing, denied by the court of appeals on November 7, 1996 ("November 7 Order"). The Spiegels then filed a second petition for leave to appeal (the "Second PLA") in the Illinois Supreme Court on November 26, 1996. On January 29, 1997, that court denied the Second PLA. The Spiegels filed a timely motion to stay the mandate, pending the filing of their petition for *certiorari* in this Court. The stay was granted on February 25, 1997. On April 22, 1997, the Illinois Supreme Court issued an Order clarifying that the mandate was stayed to May 2, pending the filing of the Spiegels'

petition for *certiorari*.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT

Marshall and Carol Spiegel were tenants of a condominium unit owned by Respondents, the Des Rosiers, located at Hollywood Towers Condominium in Chicago. In early 1993, the Spiegels made several complaints to the board of Hollywood Towers Condominium Association (the Association) about noise from the unit directly above them. The Association denied the Spiegels' complaints, and within several months demanded that the Spiegels surrender possession of their residence. In response, the Spiegels filed a complaint seeking a declaration that the Association was required to comply with the provisions of the Chicago Landlord and Tenant's Ordinance when seeking to evict tenants. The Association counterclaimed for eviction. The chancery court held that the Chicago Landlord and

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[1] We set forth this procedural chronology in unusual detail because of the Illinois Supreme Court's issuance of *two* mandate deadlines. Although this Court's jurisdiction is predicated on the date of denial of the petition for leave to appeal, rather than on stay of the mandate, we include reference to the mandate deadlines because they are related to the fact that two separate petitions for leave to appeal to the Illinois Supreme Court were filed and denied. The anomaly of more than one apparent mandate deadline in the same case was resolved by the Illinois Supreme Court's April 22 Order, establishing May 2, 1997 as the definitive date for issuance of the mandate, subject to the filing by that date of a petition for *certiorari*.

Tenant's Ordinance did not apply to the Association and "that the Association's decision [to evict the Spiegels] was binding" with regard to the Spiegels' eviction "for failure to comply" with the Association's bylaws. App. 3a. The chancery court dismissed the complaint and transferred the Association's eviction action to municipal court. There, the Des Rosiers joined in the Association's action, also seeking the Spiegels eviction and possession of the unit.

The eviction court granted summary judgment to the Association on their action to evict the Spiegels, on the ground that the chancery court's ruling was *res judicata* as to that action. Summary judgment was likewise granted in favor of the Des Rosiers. The court declined to hear the Spiegels' defense that the eviction action was in retaliation for exercising their rights under the Chicago Landlord and Tenant's Ordinance and that they had not, in fact, committed the acts alleged to be the cause of their eviction.

The Illinois court of appeals affirmed. In its decision "modified upon denial of rehearing," App. 1a, the court of appeals *inter alia* upheld the lower court's determination that litigation of those issues before the eviction court was *res judicata*, inasmuch as the chancery court had already ruled that the Spiegels "were bound by the determination of the Association and that the ordinance did not apply to the Association." App. 10a. The court did not discuss the Spiegels' contention that the trial court had erred in refusing to allow them to present a retaliatory eviction defense against the landlord. Nor did the court respond to the Spiegels' assertion, raised in their brief on appeal, that the denial of a hearing prior to being evicted violated due process.[2]

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[2] The Spiegels reiterated their due process claim when they sought leave to appeal before the Illinois Supreme Court.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an issue as basic to the guarantee of due process as any the Court confronts, because it involves state court action resulting in the loss of a family's personal residence. The question is whether a state court may deny a condominium tenant the opportunity for a hearing prior to the tenant's eviction, solely on the ground that the condominium association bylaws state that its actions are "final and binding"?

Here, the chancery court ruled as a matter of law that the Chicago Landlord and Tenant's Ordinance, Chicago Municipal Code §§ 193.1 *et seq.*, did not apply because "[t]he [condominium] association bylaws are binding upon the parties." The Illinois court of appeals affirmed on the basis that the question of the ordinance's applicability "had already been decided." App. 10a. Stripped to its essentials, the court of appeals holding means that, in the opinion of the Illinois courts, the Spiegels may not contest before a court of law the condominium association's determination to dispossess them of their home.

This holding is the basis for the Spiegels' constitutional claim. They do not contest the constitutionality of the Association's determination. They urge, rather, that the Illinois courts denied them due process by construing Illinois law in a manner that foreclosed the opportunity to present—before a court—objections and defenses to the Association's eviction action.

1. The Due Process Clause of the Fourteenth Amendment prohibits States from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This guarantee applies only if the challenged action can be fairly characterized as "state action." *Civil Rights*

Cases, 109 U.S. 3, 11 (1883). The Court has long followed the rule that "constitutional standards are invoked only when it can be said that the [government] is responsible for the specific conduct of which the plaintiff complains." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting) (interior quotation marks omitted) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

With respect to the requirement of state action, this Court repeatedly has held that "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1 , 14 (1948). In *Shelley*, third parties brought suit to enjoin the execution of an agreement of purchase between black buyers and white sellers of residential property subject to racially restrictive covenants. Chief Justice Vinson said that the covenants, standing alone, violated no rights protected by the Fourteenth Amendment. But "[t]hese are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts . . . ." *Id.* at 13-14. Accordingly, state action was present.

Similarly, in the proceedings below, the courts affirmatively ruled, and affirmed on appeal, that the Spiegels "were bound by the determination of the Association," App. 10a, in the matter of their eviction. Although the Spiegels sought to put on evidence in the lower courts that they had not committed the acts alleged to be the cause of their eviction and that the Association's actions were retaliatory, they were denied that opportunity on the sole ground that the Association's determination was binding.

There should be no mistake that the Spiegels' claim falls outside the ambit of the Due Process Clause because it has to do with the decision of a private condominium association. It was

not the actions of the Association *qua* private actor that create the constitutional infraction, but the use of the state courts to enforce the eviction. If the Spiegels were challenging only the Association's determination to evict them, the existence of state action might be debatable. In this case, however, the Spiegels' claim turns on an entirely separate question—namely, whether the Fourteenth Amendment Due Process Clause entitles the Spiegels to *some kind of hearing*, before a judicial officer of the State of Illinois may sign an eviction order dispossessing them of their home. Here, no hearing of any sort was permitted: the trial court refused to hear the Spiegels' objections and defenses to the eviction because the Association bylaws contained the proviso that the organization's decisions were "final and binding."

As this Court pointed out in *Shelley*, the judgment of a state court may create state action for purposes of due process under the Fourteenth Amendment. Given the rulings by the Illinois courts denying the Spiegels an opportunity for a hearing, state action therefore exists in this case. It follows that the Spiegels are entitled to the shelter erected by the Due Process Clause.

2. "[D]ue process is flexible, and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). To determine what process is due in a particular instance this Court repeatedly has followed the test it adopted in *Matthews v. Eldridge*.

> [I]dentification of the specific dictates of due process generally requires consideration of three

> distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

It requires only brief reflection on the *Matthews* factors to see that, *whatever* the "specific dictates of due process . . . require[d]," they were non-existent in this case. First, "the private interest . . . affected by the official action," *id.*, is no less than the Spiegels' interest in retaining possession of their family home. That the Spiegels held a legally protected property interest is beyond cavil. By paying rent according to the terms of a valid lease the Spiegels were entitled under Illinois law to possess the condominium at Hollywood Towers. *See Purvis v. Shuman*, 112 N.E. 679 (1916). The Spiegels' interest in retaining possession of their personal residence carries unusually sensitive constitutional overtones, given the privacy interests that such possession enables families to enjoy. *See* U.S. CONST. amend. IV; *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). This Court's Fourth Amendment jurisprudence, in particular, has consistently taken its bearings from "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980).

In short, the Spiegels held a legally-protected—indeed, constitutionally significant—property interest in retaining possession of their family home in the condominium at Hollywood Towers. Further, that private interest plainly was "affected by . . . official action," *Matthews*, 424 U.S. at 435. The trial court ruled, and the court of appeals affirmed, that the Spiegels' objections and defenses to the Association's determination to evict them would not be heard because the Association bylaws contained the self-characterizing terms "final and binding."

The second and third elements of the *Matthews* analysis ordinarily prompt the Court to consider a cost/benefit calculus that measures the benefits to be gained by the claimant against the costs to be borne by the government, if the Court were to find that due process requires a different procedure than the one followed in the case under review. In this case, however, this calculus cannot be performed because the court of appeals has precluded the Spiegels from having *any hearing at all*: its holding allows for neither a pre- nor postdeprivation hearing. The lower court simply regarded the Association's determination as the final word. Such a judgment cannot be squared with this Court's consistently-followed rule that "*some form of hearing* is required before an individual is finally deprived of a property interest." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added) (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931); *Dent v. West Virginia*, 129 U.S. 114, 124-25 (1889)). In other words, if the fundamental requirement of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Matthews v. Eldridge*, 424 U.S. 319, 333, then—*a fortiori*—the Spiegels were denied due process in this case. For they were denied a hearing altogether on their defenses and objections to the eviction actions.

This Court should correct the court of appeals' departure from this time-honored rule. If any "property interest" merits "some form of hearing" before deprivation becomes final, surely the possession of one's family home is such an interest.

* * *

We urge the Court to grant plenary review. In the alternative, we request that the Court summarily reverse the lower court and remand with instructions to hear the Spiegels' objections and defenses to the eviction actions.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

Ronald D. Maines
(*Counsel of Record*)
R. Shawn Gunnarson
MAINES & LOEB, PLLC
2300 M Street, N.W., Suite 900
Washington, D.C. 20037
(202) 223-2817

May 2, 1997

THE COURT OF APPEALS OF THE STATE OF ILLINOIS

SECOND DIVISION
OCTOBER 8, 1996

Nos. 1-94-0828, 1-94-2350, 1-94-2351, and 1-94-4112 (Consolidated)

MARSHALL SPIEGEL and CAROL SPIEGEL, Plaintiffs-Appellants and Cross-Appellees, v. HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION, Defendant-Appellee and Cross-Appellant and Third-Party Plaintiff (Raymond J. Des Rosiers, Bonita Des Rosiers, and M. Des Rosiers, Third-Party Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 93 CH 9656 Honorable Adolphus Rivers, Judge Presiding.

MODIFIED UPON DENIAL OF REHEARING

JUSTICE DiVITO delivered the opinion of the court:

Defendant Hollywood Towers Condominium Association (the Association) served a notice of intention to evict on plaintiffs Marshall and Carol Spiegel, who were tenants in a condominium unit owned by the Des Rosiers in the Hollywood Towers Condominium on North Sheridan Road in Chicago. Subsequently, plaintiffs brought an action in the chancery division of the circuit court seeking a declaratory judgment that the Association was bound by the Chicago Residential Landlord and Tenants Ordinance (the ordinance) (Chicago Municipal Code § 5-12-030(b) (November 6, 1991)). The Association, seeking plaintiffs' eviction, counterclaimed. The chancery division dismissed plaintiffs' complaint for declaratory judgment and transferred the action to the municipal department for eviction proceedings. There, the court granted summary judgment in favor of the Association; ordered plaintiffs evicted; granted back rent to defendants Raymond, Bonita, and M. Des Rosiers; and sanctioned plaintiffs and their attorneys pursuant to Supreme Court Rule 137 (134 Ill. 2d R. 137).

In this consolidated appeal, plaintiffs contend that (1) the chancery division erred in determining that the ordinance did not apply to the Association, (2) they were entitled to a hearing on their defenses to the eviction action, and (3) the circuit court erred in awarding the Des Rosiers Rule 137 sanctions. Plaintiffs' trial counsel, the law firm of Starr & Rowells, appeals on independent grounds the imposition of those sanctions, and the Association cross-appeals, asserting that the denial of its petition for sanctions against plaintiffs was an abuse of discretion. For the reasons that follow, we affirm the judgments of the circuit court.

In January 1993, plaintiffs made several complaints to the Association regarding loud noises coming from the unit located directly above them. As a result, the board of directors of the Association conducted a hearing to determine whether there had been any violations of the condominium declaration. The board

concluded that plaintiffs' complaints of noise from the apartment above them were unfounded and that the sounds complained of were common "to most apartment buildings of the same age as Hollywood Towers." With respect to harassment complaints that had been made against Marshall Spiegel, the board cautioned that "any further confrontation between any of the participating parties *** will be considered a violation of the Association's by-laws." Sometime later, additional complaints were made against Marshall Spiegel. On July 6, 1993, the board determined that plaintiffs had violated the Association's declaration and bylaws; that plaintiffs and the Des Rosiers each should be required to pay $300; and that plaintiffs had to vacate their apartment by July 23, 1993.

In September and October 1993, the Association served plaintiffs with 30-day notices of its intention to file a forcible entry and detainer action. Plaintiffs responded by seeking an injunction, a declaration that the Association had not complied with the ordinance and was therefore barred from filing that action, and damages. Plaintiffs later amended their complaint to seek a declaration that the Association had not properly resolved their complaint of intolerable noise and requesting that the Association be enjoined to enforce the bylaws against the other tenants.

The Association filed a motion to dismiss and a counterclaim seeking to evict plaintiffs. The chancery division dismissed plaintiffs' complaint with prejudice. The court specifically found that the ordinance was not applicable to the Association where it was not the owner of the rental unit and that the Association's decision was binding with regard to its ruling both on plaintiffs' eviction for failure to comply with the Association's declaration and bylaws and on plaintiffs' complaint of nuisance against the adjoining unit. The court then transferred the Association's forcible entry and detainer counterclaim to the

municipal department for further proceedings. There, the Association's counterclaim was consolidated with a similar claim that had been filed by the Des Rosiers.

In the municipal department, the Association, relying on the doctrine of *res judicata*, moved for summary judgment. On May 23, 1994, the circuit court granted the Association's motion for summary judgment, awarding it possession of the unit with enforcement of the order to be stayed for 45 days until July 7, 1994. After trying unsuccessfully to stay that order, plaintiffs were evicted on July 21, 1994.

The Des Rosiers also filed a motion for summary judgment, which was granted on June 29, 1994. In addition to granting the Des Rosiers possession of the unit, the circuit court ordered plaintiffs to pay $8,400 in back rent plus costs. As in the Association's motion, enforcement of the order was stayed until July 7, 1994.

On June 9, 1994, the Association filed a motion seeking Supreme Court Rule 137 sanctions and attorney fees, but that motion was denied. On July 29, 1994, the Des Rosiers also filed a motion for sanctions and attorney fees. The circuit court entered an order awarding the Des Rosiers sanctions in the amount of $5,515.84 against plaintiffs and their counsel, Starr & Rowells, jointly and severally. The court further ordered additional sanctions against Marshall Spiegel, individually, in the amount of $550.41.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs contend that the circuit court erred in dismissing their complaint for declaratory judgment. They assert that because the Association's intention in filing the forcible entry and detainer action was to assume the possessory rights of the Des

Rosiers, it was bound by the provisions of the ordinance as a "successor in interest." Several preliminary matters must be addressed before we turn to the merits of plaintiffs' claim. Plaintiffs contend that the circuit court lacked jurisdiction under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 1992)) to entertain the Association's counterclaim seeking their eviction.

Subject matter jurisdiction is the power of the court to hear and determine the matter presented to it. *In re Estate of Steinfeld*, 158 Ill. 2d 1, 12, 630 N.E.2d 801 (1994). Where a court exceeds its jurisdiction, its order is void and may be attacked at any time. *In re Estate of Steinfeld*, 158 Ill. 2d at 12.

Because the Forcible Entry and Detainer Act is a statute that is in derogation of the common law, "'[t]he conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist and *** the mode of procedure provided by it must be strictly pursued." *Avdich v. Kleinert*, 69 Ill. 2d 1, 6, 370 N.E.2d 504 (1977).

Section 9-102 of the Forcible Entry and Detainer Act provides the circumstances under which an action for possession may be maintained. 735 ILCS 5/9-102 (West 1992). As plaintiffs point out, when the Association filed its counterclaim, that section did not provide that a condominium association could bring an action for possession against a lessor for the breach of any covenants, rules, regulations or bylaws of the association. See 735 ILCS 5/9-102(a) (West 1992). We note that the current version of the Forcible Entry and Detainer Act was amended by Public Act 89-41, effective June 23, 1995, to so provide. 735 ILCS 5/9-102(a)(7) (West Supp. 1995). In 1993, however, the Forcible Entry and Detainer Act did not itself permit the Association to file an action for possession. That statute, however, is not the only one applicable to this case.

In 1993, section 18(n)(ii) of the Condominium Property Act provided in relevant part that "[t]he board of managers may proceed directly against a tenant, at law or in equity, or under the provisions of [the Forcible Entry and Detainer Act], for any other breach by tenant of any covenants, rules, regulations or bylaws." 765 ILCS 605/18(n)(ii) (West 1992). Thus, the Condominium Property Act granted a right of action for the Association not provided for in the Forcible Entry and Detainer Act. Plaintiffs contend that, because of the doctrine of strict construction, the expansion of the Forcible Entry and Detainer Act is impermissible.

In Illinois, however, a construction of two statutes that allows both to stand is favored. *Jahn v. Troy Fire Protection District*, 163 Ill. 2d 275, 280, 644 N.E.2d 1159 (1994). Statutes are to be construed so that they are not rendered meaningless or superfluous. *People v. Singleton*, 103 Ill. 2d 339, 345, 469 N.E.2d 200 (1984). "The primary rule of statutory interpretation is that a court should ascertain and give effect to the intention of the legislature." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 91, 606 N.E.2d 1111 (1992).

Here, the plain language of section 18(n)(ii) indicates that the legislature intended to permit condominium [sic] associations to proceed under the Forcible Entry and Detainer Act. 765 ILCS 605/18(n)(ii) (West 1992). We decline to hold that this expansion of jurisdiction was impermissible because to do so would render section 18(n)(ii) meaningless. Accordingly, the circuit court had jurisdiction [sic] to entertain the Association's action. That is the sensible and reasonable result intended by the legislature.

Although the Association argues that plaintiffs' appeal of this issue is moot because they have been evicted from the premises, plaintiffs' amended complaint also sought damages in

addition to declaratory relief. Accordingly, our decision affects a matter still in controversy and we consider plaintiffs' appeal. Also, we deny the Des Rosiers' motion to strike a statement in plaintiffs' reply brief that asserts that the Des Rosiers made admissions that were beneficial to plaintiffs.

We note that although the Association brought its motion to dismiss pursuant to section 2-615 of the Civil Practice Law (735 ILCS 5/2-615 (West 1992)), the motion asserted that the ordinance was inapplicable to it. That defense is an affirmative matter extraneous to the complaint that may be brought only pursuant to section 2-619 (735 ILCS 5/2-619 (West 1992)). Accordingly, because of the extraneous information relied upon by the Association in its motion, we treat the motion as if brought under section 2-619.

The purpose of a motion to dismiss under section 2-619 is to dispose of issues of law and easily proved issues of fact at the outset of a case. *Zedella v. Gibson*, 165 Ill. 2d 181, 185, 650 N.E.2d 1000 (1995). In ruling on a section 2-619 motion to dismiss, a court may consider pleadings, depositions, and affidavits. *Zedella*, 165 Ill. 2d at 185. A reviewing court will determine the propriety of the granting of a motion to dismiss *de novo*. *Toombs v. City of Champaign*, 245 Ill. App. 3d 580, 583, 615 N.E.2d 50 (1993), *appeal denied*, 152 Ill. 2d 581, 622 N.E.2d 1229 (1993). The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17, 619 N.E.2d 732 (1993).

We turn to the merits of plaintiffs' claim that the ordinance is applicable to the Association. The ordinance defines "landlord" as "the owner, agent, lessor or sublessor, or the successor in

interest of any of them, of a dwelling unit or the building of which it is part." Chicago Municipal Code § 5-12-030(b) (November 6, 1991). Plaintiffs do not dispute that the Des Rosiers were the owners of the condominium unit, but rather claim that the Association acted as their successor in interest as contemplated by the ordinance.

Black's Law Dictionary defines "successor in interest": "a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance, and [a] transferee is not a 'successor in interest.'" Black's Law Dictionary 1283-84 (5th ed. 1979).

Here, the Association derived its right to maintain an action for possession not from the Des Rosiers but from the Condominium Property Act. As stated previously, that act provides that an association may proceed directly against a tenant for any breach by a tenant of any covenants, rules, regulations, or bylaws. 765 ILCS 605/18(n)(ii) (West 1992). Because the Association had the right to maintain an action for possession independent of the Des Rosiers, we conclude that it was not a successor in interest to which the ordinance would apply.

Plaintiffs rely on several cases in which courts have stated that the relationship between a condominium association and unit owners is "akin to that of a landlord and tenant." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 639 N.E.2d 974 (1994); *Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986); *Hemispheres Condominium Ass'n v. Corbin*, 357 So. 2d 1074 (Fla. 1978). In those cases, however, the courts analogized the duty of a condominium association to use reasonable care in maintaining the common elements to that of a landlord's duty to a tenant; they did not address the issue of whether a condominium association may be considered a successor in interest to a unit owner. Accordingly,

we find them unpersuasive and we affirm the circuit court's order dismissing plaintiffs' complaint for declaratory judgment.

EVICTION PROCEEDINGS

Plaintiffs next contend that the circuit court erred in granting summary judgment in favor of the Association based on its determination that the previous rulings made by the chancery division were *res judicata* with respect to the forcible entry and detainer action.

In appeals from an order granting summary judgment, a reviewing court examines the record *de novo*. *In re Estate of Hoover*, 155 Ill. 2d 402, 411, 615 N.E.2d 736 (1993). A court must consider the affidavits, depositions, admissions, exhibits and pleadings on file and must construe the evidence strictly against the movant. *Hoover*, 155 Ill. 2d at 410-11. Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204 (1992).

In *Burke v. Village of Glenview*, 257 Ill. App. 3d 63, 69, 628 N.E.2d 465 (1993), the court summarized the doctrine of *res judicata*:

> "Once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in new proceedings. The doctrine has three essential elements to its application: the cause of action, the parties or their privies and the subject matter must be the same in both cases."

Plaintiffs contend that the doctrine of *res judicata* was inapplicable because there was no identity of the causes of action heard in the respective courts. They also claim that the ruling in the eviction proceedings improperly barred them from presenting as their defense their claims that they had not committed the acts alleged as the basis for their eviction and that their eviction was in retaliation for their exercise of their rights under the ordinance.

In their complaint for declaratory judgment, plaintiffs asserted that the Association could not maintain an action in forcible entry and detainer without complying with the provisions of the ordinance, and that a determination made by the board of directors was not binding on them. In the forcible entry and detainer action, although the circuit court had already ruled against them on these issues, plaintiffs asserted the same matter as their affirmative defenses. Accordingly, we find that there was identity of the causes of action and the circuit judge in the municipal department properly determined that *res judicata* barred relitigation of those issues.

Also, plaintiffs' contentions that they were improperly barred from presenting as a defense that they had not committed the acts alleged to be the cause of their eviction and that they were being evicted in retaliation for their exercise of their rights under the ordinance had already been decided when the chancery division ruled that plaintiffs were bound by the determination of the Association and that the ordinance did not apply to the Association.

Accordingly, because judgment in favor of the Association was proper as a matter of law, we conclude that the circuit court did not err in granting summary judgment.

SUPREME COURT RULE 137 SANCTIONS

Plaintiffs contend that the circuit court erred in imposing Supreme Court Rule 137 (134 Ill. 2d R. 137) sanctions in favor of the Des Rosiers because as "lay persons," they could not have known whether their attorney's legal arguments were in good faith with respect to his "routinely filed" motions to dismiss. They assert that the motions to dismiss for which they were sanctioned were based solely on arguments concerning existing law and not "existing facts" so that only their attorney should have been sanctioned.

Rule 137 provides for sanctions where a pleading is not well grounded in fact or warranted by existing law. 134 Ill. 2d R. 137. A circuit court's decision whether to impose Rule 137 sanctions is entitled to considerable deference upon review and will not be reversed absent an abuse of discretion. *In re Marriage of Irvine*, 215 Ill. App. 3d 629, 637, 577 N.E.2d 462 (1991). A circuit court exceeds its discretion only where no reasonable person would take the view adopted by it. *Lewy v. Koeckritz International, Inc.*, 211 Ill. App. 3d 330, 334-35, 570 N.E.2d 361 (1991).

The plain language of Rule 137 provides that a court may impose sanctions "upon the person who signed [a frivolous pleading], a represented party, or both." 134 Ill. 2d R. 137. Thus, Illinois courts have sanctioned parties for argument made by counsel, notwithstanding the fact that those arguments were purely "legal" in nature. See, *e.g.*, *Dreisilker Electric Motors, Inc. v. Rainbow Electric Co.*, 203 Ill. App. 3d 304, 312, 562 N.E.2d 970 (1990). Here, we find no basis for concluding that the circuit court abused its discretion in imposing sanctions against plaintiffs, especially where the record demonstrates that Marshall Siegel [sic] took a very active part in his own defense.

Accordingly, the court's order imposing sanctions against plaintiffs in favor of the Des Rosiers is affirmed.

Starr & Rowells contends that the sanctions assessed against it should be vacated because the circuit court violated Rule 137 by not setting forth in writing the factual basis for its award. The Des Rosiers have not filed a response, purportedly because Starr & Rowells represented to them that it would voluntarily dismiss its appeal. Starr & Rowells has not done so. We nevertheless reach the merits of its contentions under the principles enunciated in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493 (1976).

In *Bank of Homewood v. Chapman*, 257 Ill. App. 3d 337, 349-50, 628 N.E.2d 974 (1993), the court stated:

> "The specific factual basis of the trial court's decision [to impose sanctions] is needed so that the reviewing court may determine (1) whether the trial court's decision was an informed one; (2) whether the decision was based on valid reasons that fit the case; and (3) whether the decision followed logically from the application of the reasons stated to the particular circumstances of the case."

On review, a court order must be construed in a reasonable manner so as to give effect to the apparent intention of the circuit court and must be interpreted in its entirety with reference to other parts of the record. *Granville Beach Condominium Ass'n v. Granville Beach Condominiums, Inc.*, 227 Ill. App. 3d 715, 720, 592 N.E.2d 160 (1992).

The court order imposing sanctions on Starr & Rowells was drafted by one of its own attorneys, and there is a question whether it can now appeal any defect in that order. *Johnson v. Board of Review, Illinois Department of Labor*, 133 Ill. App. 3d 992, 993, 479 N.E.2d 1082 (1985) (party cannot commit error and then seek to benefit from it). Further, the transcript of the hearing on the motion for sanctions indicates that the circuit court articulated in detail the basis for each sanction imposed. Accordingly, we find no error in the court's failure to reduce those reasons to writing.

The final matter before us is the Association's cross-appeal, which asserts that the circuit court erred in denying its petition for sanctions against plaintiffs. The Association claims that plaintiffs' conduct in continuing to pursue a claim which they knew had no chance of success was sanctionable. We note that the conduct to which the Association objects was not, in fact, pursuit of a claim, but was rather assertion of affirmative defenses to the Association's counterclaim seeking eviction. Plaintiffs have not filed a response to the cross-appeal, but we again review the merits of the appeal pursuant to *First Capitol Mortgage*, 63 Ill. 2d at 133.

The purpose of Rule 137 is not to penalize litigants and attorneys simply because they might be unsuccessful in their litigation; rather, it is to penalize litigants who plead frivolous or false matters or bring suit without any basis in law. *In re Marriage of Sykes*, 231 Ill. App. 3d 940, 946, 596 N.E.2d 1226 (1992). Although the Association ultimately prevailed against plaintiffs, because of the deference afforded the circuit court's rulings regarding sanctions and the standard of review that requires reversal only when no reasonable person would take the view adopted by the circuit court, we find no basis for concluding that the circuit court erred in denying the Association's motion for sanctions.

The judgments of the circuit court are affirmed.

Affirmed.

HARTMAN, P.J., and BURKE, J., concur.

81124

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

December 4, 1996

Mr. Richard C. Leng
Leng Stowell Friedman & Vernon
321 South Plymouth Court, S#1400
Chicago, IL 60604

No. 81124 - Marshall Spiegel et al., petitioners, v. Hollywood Towers Condominium Association et al., respondents.
Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1996.

ILLINOIS SUPREME COURT
82450 JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

January 29, 1997

Mr. Richard C. Leng
Leng Stowell Friedman & Vernon
321 South Plymouth Court, S#1400
Chicago, IL 60604

No. 81124 - Marshall Spiegel et al., petitioners, v. Hollywood Towers Condominium Association et al., respondents.
Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 20, 1997.

(2)

No. 96-1764

Supreme Court, U.S.
FILED
JUN 4 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARSHALL SPIEGEL and CAROL SPIEGEL,

Petitioners,

v.

HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION and RAYMOND J., BONITA, & M. DES ROSIERS,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HAL R. MORRIS
(*Counsel of Record*)
ALLAN GOLDBERG
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Attorneys for Respondent Hollywood Towers Condominium Association

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

13 pp

LIST OF INTERESTED PARTIES

Petitioners have not separately provided a list of all parties to the proceeding in the court whose judgment is sought to be reviewed. Thus, to assist this Court, Respondent states as follows:

1. The Petitioners are Marshall Spiegel and Carol Spiegel.

2. The Respondents are correctly identified in the caption as Hollywood Towers Condominium Association, an Illinois not-for-profit corporation, and Raymond J., Bonita and Mary Alexis Des Rosiers.

3. This Brief in Opposition is filed only on behalf of Hollywood Towers Condominium Association.

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Respondent, Hollywood Towers Condominium Association, requests that this Court deny the Petition for *Writ of Certiorari* seeking review of an opinion of the Illinois Appellate Court, First District. The Appellate Court's Opinion is reported and appears in the Petition Appendix at 1a-14a. The orders of the trial court are not reported. (Pet. App. 2a).

STATEMENT OF JURISDICTION

The sole question advanced for review by the petition was never presented to the Illinois courts. Thus, this Court cannot properly exercise jurisdiction over this case, pursuant to 28 U.S.C. §1257(a), because these newly presented arguments may not properly be considered by *Writ of Certiorari.*

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for *Writ of Certiorari.* For the most part, the Petition assails the Illinois judiciary's ruling that Petitioners were barred from rearguing certain alleged "defenses." But, as the Illinois Appellate Court's opinion reveals, Petitioners were not denied the right to present any defenses except those that had previously been adjudicated, at the insistence of Petitioners, in a prior proceeding. Thus, the Illinois court did not deny Petitioners an opportunity to be heard but, rather, denied them a second opportunity to be heard because "there was identity of the causes of action and the circuit judge in the municipal department properly determined that *res judicata* barred re-litigation of those issues." (Pet. App. at 10a.)

Furthermore, although Respondent is cognizant of Petitioners' desire to capture this Court's attention, misstatements are an inappropriate basis on which to grant certiorari and, unfortunately, they continue throughout the Petition.

A. Trial Proceedings And Disposition Of The Case Below.

Few cases that come before this Court have already required the judicial attention and resources of this case. In fact, the matter giving rise to the initial trial court complaint by Petitioners has been before the trial and appellate courts of the State of Illinois since 1993. Indeed, the very dispute now brought before this Court has been considered in no less than four (4) separate Illinois trial court proceedings, nine (9) Illinois appeals, countless motions to reconsider, a federal action and appeal, and three (3) requests for leave to appeal to the Illinois Supreme Court, all of which were brought by Petitioners and all of which were unsuccessful and ultimately decided against them. Because the Petition for *Writ of Certiorari* fails to provide the necessary factual and procedural background for this Court, Respondent believes that certain additional facts are necessary to help understand the basis for and propriety of the Illinois courts' many rulings, as well as demonstrate the absolute lack of merit to this Petition.

By unpublished order, dated April 30, 1996, the Illinois Appellate Court affirmed that (i) the Chicago Residential Landlord & Tenants Ordinance was inapplicable to the relationship between Petitioners and the Association; (ii) that a prior determination that a noise complaint was

baseless was binding on Petitioners; and (iii) that Petitioners could be removed from a residential condominium unit they rented from co-respondents.[1] Petitioners did not seek rehearing of that Order but, instead, filed a petition for leave to appeal to the Illinois Supreme Court. (Case No. 81124). On December 4, 1996, that petition was denied.

In the interim, however, the Illinois Appellate Court chose to publish its April 30, 1996 Order, without any material change other than redenominating the unpublished Order as an Opinion. Incredibly, Petitioners then sought rehearing. Petitioners argued to the Appellate Court that the trial court lacked the requisite jurisdiction to terminate their residency, positing that the judgment in favor of the Association, which extinguished their continuing right to reside at the Association, was void. In an Opinion "modified upon denial of rehearing," the Appellate Court again affirmed. Petitioners then sought rehearing of the Opinion, which had already been modified upon their request for rehearing. The Illinois Appellate Court denied that request. Thereafter, Petitioners sought leave to appeal, for the second time, to the Illinois Supreme Court. (Case No. 82450). For the second time, the Illinois Supreme Court refused to grant leave to appeal.

The proceedings in the Illinois courts make clear that Petitioners were repeatedly afforded the right to present

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[1] The Appellate Court also affirmed the trial court's judgment in favor of Petitioners' lessors, co-respondents, that Petitioners could be evicted. Thus, independent of the Association's action, Petitioners were ordered to vacate their rental residence, which has now been sold to unrelated third parties.

any and every argument in support of their position. However, Petitioners chose to time and again repeat the very same arguments, evidently hoping to eventually find a sympathetic court. Finding none, Petitioners now posit that their due process rights were abridged, never having argued that in the state court. Most telling, Petitioners do not cite to any part of the record suggesting otherwise.

B. Correction Of The Statement In The Petition.

The Opinion of the Illinois Appellate Court correctly sets forth the facts of this case. Indeed, the Opinion accurately depicts the repetitive and baseless nature of Petitioners' claims. In the interest of brevity, Respondent respectfully directs this Court's attention to the Appellate Court's Opinion. However, pursuant to United States Supreme Court Rule 15(2), Respondent brings the following misstatements contained in the Petition to the Court's attention.

Petitioners are far less than candid to claim that "[b]y paying rent . . . the Spiegels were entitled under Illinois law to possess the condominium." (Pet. at 8). The Trial and Appellate Courts specifically recognized that Petitioners had failed to pay $8,450 in back rent. Thus, not only did the Illinois trial court grant judgment on the Association's counter-claim, it separately granted the unit owner and lessor "the Des Rosiers possession of the unit . . . [and] ordered plaintiffs to pay $8,450 in back rent." (Pet. App. 4a). Although the landlord's eviction was affirmed, Petitioners have not questioned that order and, therefore, even if they are able to overturn the judgment in favor of the Association, they cannot have

their unit restored to them. Moreover, Petitioners claim that the Appellate Court "precluded the Spiegels from having any hearing at all." (Pet. at 9). To the contrary, the Appellate Court found that "the Association conducted a hearing . . ." (Pet. App. at 2a) and that Petitioners presented their arguments to the Chancery Court. (Pet. App. at 10a).

REASONS FOR DENYING THE PETITION

I.

This Court Has No Jurisdiction To Consider Petitioners' Arguments.

This Court's review of judgments rendered by state courts is limited to circumstances where a federal question has been *both* raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (refusing to consider due process claims that were not raised or addressed below); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962) ("unbroken line of precedent" refusing to consider issues which petitioner failed to argue in state court). Illinois law is consistent and similarly holds that arguments not presented and preserved in the trial court cannot be presented in the Appellate or Supreme Court. *Eagan v. Chicago Transit Authority*, 158 Ill.2d 527, 534 (1994).

Nevertheless, in this Court, for the first time, Petitioners argue that they have been denied their Fourteenth Amendment due process rights. Significantly and their current claims aside, Petitioners never cited the Fourteenth Amendment or the due process clause to the

Illinois Trial, Appellate, or Supreme Courts. That was, of course, despite the fact that they filed numerous petitions for leave to appeal and motions to reconsider. Further, the only claim ever presented that was even remotely connected to a constitutional attack was that the Trial Court did not have "jurisdiction" to evict Petitioners. However, after modifying its Opinion on rehearing, the Appellate Court concluded that jurisdiction was not lacking and ruled "that [the Illinois Condominium] Act provides that an Association may proceed directly against a tenant for a breach by a tenant of any covenants, rules, regulations or by-laws." (Pet. App. 8a). Thus, for this fundamental reason, Petitioners should not be permitted to now seek review on such a specious constitutional ground.

II.

The Illinois Courts Did *Not* Compromise Petitioners' Right To Due Process.

Petitioners are patently wrong when they assert that their constitutional right to due process was jeopardized by the holdings of the Illinois courts. First, although Petitioners announced that "they were denied a hearing altogether on their expenses and objections." (Petition, p. 9), however, what the Illinois courts prevented Petitioners from doing was *again* seeking a hearing on the very issues which had been previously decided in the context of a declaratory action initiated by Petitioners. Reference to the Appellate Court's Opinion is most telling:

> In their complaint for declaratory judgment, plaintiffs asserted that the association could not maintain an action in forcible entry and detainer

> without complying with the provisions of the ordinance, and that a determination made by the Board of Directors is not binding on them. In the forcible entry detainer action, although the circuit court had already ruled against them on these issues, *plaintiffs asserted the same matter* as their affirmative defenses. (emphasis supplied).

(Petition, App. 10a). Thus, what Petitioners apparently seek is a second hearing. There is, however, no requirement in this Court's jurisprudence requiring multiple hearings on the same issues. Rather, *res judicata* bars the relitigation of matters already decided. *Doe v. Allied Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993).

Further, Petitioners do not—and cannot—allege that they did not have notice and an opportunity to be heard on the issues involved in the Illinois actions. In addition to the court hearings, Petitioners were involved in administrative hearings before the Association's Board of Directors. Due process is amply satisfied by a proceeding in which a party has counsel, an opportunity to be heard and adduce evidence, and an opportunity to cross-examine adverse witnesses. See, *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Petitioners having agreed to and, in fact, invoking a process of nonjudicial dispute resolution (i.e., a hearing before the Board), may not then attack the outcome of that process when the decision goes against them. *Commodity Futures Trading Commission v. Schnor*, 478 U.S. 833, 849-50 (1986). Dissatisfaction does not rise to the level of a constitutional challenge nor can it form the basis of a petition for *writ of certiorari*.

III.

Any Review Would Be Advisory In Nature.

Fundamentally, Petitioners' purported constitutional argument is that they dislike the outcome of the many hearings which they initiated over approximately a four (4) year period. Somehow, petitioners hope to raise a constitutional challenge to proceedings which they invoked. Moreover, and Petitioners' doomsday cries aside, Petitioners ignore the fact that the Illinois courts also terminated their possession to the residential unit in favor of their landlord. Phrased somewhat differently, Petitioners do not attack or even question the Court's judgment to evict Petitioners and place their landlord back in possession. Accordingly, any issue which Petitioners seek to raise here is moot because even if the new constitutional challenge to the Association's judgment is sustained, the judgment in favor of the landlord has not been questioned and will stand. Thus, petitioners will not—indeed cannot because of an intervening sale of the unit—be put back in possession. Accordingly, consideration of this matter will have no effect on the parties. This Court should not unnecessarily grant *certiorari* to decide moot cases as any decision here would be wholly advisory and will not affect the rights of the parties. *DeFuris v. Odegaard*, 416 U.S. 312, 319 (1974) (actual controversy must exist at all stages of appellate and *certiorari* reviews). For this further reason, the *Writ of Certiorari* should be denied.

CONCLUSION

Based on the foregoing reasons, Respondent respectfully submits that the *Writ of Certiorari* should be denied.

Respectfully submitted,

HAL R. MORRIS
(Counsel of Record)
ALLAN GOLDBERG
ARNSTEIN & LEHR
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Attorneys for Respondent
Hollywood Towers
Condominium Association

June 4, 1997

(3)

Supreme Court, U.S.
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No. 96-1764

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARSHALL SPIEGEL AND CAROL SPIEGEL,
Petitioners,

v.

HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION AND RAYMOND J., BONITA, & M. DES ROSIERS,
Respondents.

On Petition For Writ of Certiorari To
The Illinois Supreme Court

REPLY BRIEF FOR PETITIONERS

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

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ARGUMENT

This case raises a substantial question about the judicial process guaranteed by the Fourteenth Amendment to the federal Constitution, when a State exerts its authority to evict a family from their home. May a State court deny tenants an opportunity to present their objections to a condominium association's determination to evict them, merely because the association's bylaws state that such a determination is "final and binding"?

The present controversy arose when Petitioners Marshall and Carol Spiegel (the Spiegels) filed an amended complaint in the chancery court against Respondent Hollywood Towers Condominium Association (the Association)[1] seeking a declaration that the Association had failed to properly resolve their complaints regarding the noise created by adjoining neighbors and an injunction compelling the Association to enforce the Association bylaws against other tenants. The Association counterclaimed, requesting an order evicting the Spiegels. The chancery court dismissed the Spiegels' complaint and transferred the eviction action to municipal court. Before transferring the case, however, the chancery court held that the Chicago Landlord and Tenant's Ordinance, Chicago Code §§ 193.1 *et seq.*, did not apply because "[t]he [condominium] association bylaws are binding upon the parties." The Illinois Appellate Court (Appellate Court) affirmed, and the Illinois supreme court denied the Spiegels' petitions for leave to appeal. In effect, this judgment denied the Spiegels an opportunity to present substantial defenses to the Association's eviction action, merely because the Association bylaws state that any

[1] Respondents' "List of Interested Parties" states: "This Brief in Opposition is filed only on behalf of Hollywood Towers Condominium Association." Br. Opp. at i. This sentence carries serious consequences for the Des Rosiers' defense. Their choice not to join the Association's brief in opposition is deemed a waiver of any objection (other than one that casts doubt on jurisdiction) to this Court's consideration of the Spiegels' Question Presented. *See* SUP. CT. R. 15.2. For this reason, we refer to Respondents as "the Association" for the purposes of any non-jurisdictional issues.

determination by the Association's Board of Directors is "final and binding" on the residents.

The Question Presented asks this Court to decide whether the Illinois supreme court violates the tenants' right to due process under the Fourteenth Amendment. The Court's precedent establishes that a person who holds vested property rights, such as the possessory rights conferred by a condominium lease, cannot be deprived of such rights by a State without adequate notice and a hearing. The crux of the Spiegels' claim is that the State of Illinois deprived them of a meaningful hearing when the trial court held (and both the Appellate Court and the Illinois supreme court affirmed) that the Spiegels could not present defenses to the Association's eviction action, because the Association bylaws characterize decisions by the Association board as "final and binding." If left uncorrected, this judgment would mean, in effect, that State courts may exert their eviction authority without affording tenants a meaningful opportunity to present defenses to that action.

The Association and the Owners advance several reasons for denying review. None of them is ultimately persuasive.

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONERS' CASE.

Respondents urge the Court to deny the Spiegels' petition for lack of jurisdiction. First, they assert that the Spiegels "never cited the Fourteenth Amendment or the due process clause to the Illinois trial, Appellate, or Supreme Courts." Br. Opp. at 5-6. Second, they argue that the Spiegels' Question Presented "was never presented to the Illinois courts." Br. Opp. at 1. On both points Respondents are simply mistaken.

With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533 (1992), the Court exercises jurisdiction under 28 U.S.C. § 1257(a) only if a petitioner's federal claim was expressly addressed by the State court or properly presented for its review. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985). If the opinion of the State court does not expressly address the federal claim, the petitioner can still invoke the Court's jurisdiction if he successfully bears the burden of proving that the claim was nonetheless properly presented. *See Street v. New York*, 394 U.S. 576, 582 (1969). To meet that burden the petitioner must show that his federal claim was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Thus, whether the State court opinion contains citations to federal statutory or constitutional provisions is not the sole touchstone of jurisdiction under 28 U.S.C. § 1257(a). Jurisdiction lies with the Court so long as the petitioner can show that the federal claim was presented to the State court "with fair precision and in due time." *Id.* The Spiegels can make that showing in this case.

In their case before the Appellate Court the Spiegels raised three issues for review, one of which was "[w]hether plaintiffs were entitled to a hearing on their defenses to the eviction actions." Br. App. Ct. at 2. Later in the brief, the Spiegels connected their claim for a hearing with the procedural guarantees of the Fourteenth Amendment Due Process Clause. They wrote, "Indeed, this judicial hearing is necessary to satisfy a tenant's *due process rights*." *Id.* at 9 n.4 (emphasis added). In support of this proposition they cited two cases: *American Property Management Company v. Green Talaefard*, 552 N.E.2d 14 (Ill. App. Ct. 1990) and *Bowlby v. NDB Bank*, 640 N.E.2d 1095 (Ind. Ct. App. 1994). Each case plainly cites and discusses the Fourteenth Amendment Due Process Clause's guarantee of a fair hearing when a tenant is threatened with eviction. With this connection between the phrase "due process rights" and the

Fourteenth Amendment Due Process Clause established, the Spiegels can be said to have described their constitutional claim "with fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). They reiterated the identical claim in both petitions for leave to appeal to the Illinois supreme court. *See* Pet. L. App. I, at 6; Pet. L. App. II, at 11 n.3. Accordingly, Respondents' first contention, that the Court lacks jurisdiction because the Spiegels "never" cited the Fourteenth Amendment Due Process Clause, must be rejected.

Respondents' second objection to the Court's jurisdiction rests on a misunderstanding of the distinction between a federal *claim* and a federal *question*. Distinguished commentators have defined what the Court denominates a federal claim as a "reference to the particular clause of the federal Constitution or the particular treaty or statute relied upon, as well as the rights claimed thereunder." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 119 (7th ed. 1993). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)).

Once the Spiegels properly raised the *claim* that they were entitled to a hearing under the Fourteenth Amendment Due Process Clause, they were free to frame the Question Presented—and any argument in support of their claim—as they wished. *See Yee*, 503 U.S. at 535-36. It is therefore irrelevant whether the *arguments* articulated in this Court to support the Spiegels' due process claim are borrowed from earlier proceedings, or entirely novel.

In sum, Respondents' jurisdictional objections are ill-founded. This case presents a substantial federal question, which the Spiegels properly raised in the courts below.

II. PETITIONERS' EVICTION DOES NOT RENDER THEIR CLAIM MOOT.

The Association also contends that the Spiegels' petition for writ of *certiorari* should be denied because, as tenants, their claim is moot. They assert that the lower courts issued two orders evicting the Spiegels, one on behalf of the Association and the other on behalf of the Owners,[2] and that their residence at Hollywood Towers "has now been sold to unrelated third parties." Br. Opp. at 3 n.1. From this they draw the following conclusion:

> [E]ven if the new constitutional challenge to the Association's judgment is sustained . . . petitioners will not—indeed cannot because of an intervening sale of the unit—be put back in possession. Accordingly, consideration of this matter will have no effect on the parties.

Br. Opp. at 8.

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[2] Respondents point out that the Illinois Appellate Court affirmed the trial court judgment in favor of the Des Rosiers' action to evict the Spiegels. Br. Opp. at 3 n.1. Even if true, this fact does not advance the Association's argument against granting *certiorari*. If the lower courts denied the Spiegels a meaningful hearing before issuing an order evicting them from their home, as the Spiegels maintain, then the existence of a second eviction action is irrelevant to the question whether such a denial violated the Spiegels' due process rights. Moreover, the Des Rosiers cannot use their eviction as a weapon against the Spiegels' petition. By failing to join the brief in opposition they have waived all but jurisdictional objections to considering the question presented, *see supra* note 1. A second eviction order against the Spiegels, if useful to Respondents at all, goes to the issue of mootness, which falls in the category of justiciability, not jurisdiction.

A similar argument appeared in the the Association's case before the Illinois Appellate Court. It failed. The Association argued that the Spiegels' attempt to challenge the expansion of the Forcible Entry and Detainer Act was moot because the Spiegels had been evicted before the Appellate Court reached its decision. The court rejected this argument on the ground that "plaintiffs' amended complaint also sought damages in addition to declaratory relief." Pet. App. 6a-7a.

For the same reason this Court should reject the Association's argument that the eviction of the Spiegels from their residence at Hollywood Towers moots the Question Presented. The general rule is that, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895) (omitting intervening citations)), the appeal will be dismissed. However, a claim is not moot if a favorable judgment can afford Petitioners even partial relief. *See* 506 U.S. at 13. In the case at bar, damages may not afford the Spiegels total relief from the injuries they have suffered as a consequence of being wrongly evicted. But damages would offer the Spiegels partial relief, and that is all that is required to maintain a live controversy. The Association's attempt to cast the Spiegels' claim as moot therefore must be rejected.

III. PETITIONERS WERE DENIED DUE PROCESS OF LAW.

The Association contends on two grounds that the Spiegels' due process rights were not violated by the courts below. First, it argues that, by denying the Spiegels an opportunity to present defenses to the Association's eviction action, the Illinois courts merely prevented the Spiegels from relitigating an issue that was

res judicata. *See* Br. Opp. at 6-7. Second, the Association argues that the Spiegels were afforded an adequate hearing by the Association's Board of Directors. *See id.* at 7. Neither argument is sound.

A. *Res judicata*. The trial court held that the Association Board of Directors' determination to evict the Spiegels lay beyond the court's jurisdiction because the Association bylaws stated that such determinations were "final and binding." The Association argues that the Spiegels' attempts to obtain a judicial hearing, in which to present defenses to the eviction action, is actually a search for "a second hearing," Br. Opp. at 7, precluded by *res judicata*. This notion is grossly flawed.

The Court's precedents clearly explain the parameters of *res judicata* and the purposes it serves.

> Under res judicata, "a *final judgment* on the merits bars further claims by parties or their privies based on the same cause of action." . . . Res judicata thus encourages reliance on *judicial decisions*, bars vexatious litigation, and frees the courts to resolve other disputes.

Brown v. Felsen, 442 U.S. 127, 131 (1979) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added)).

The operative phrases "final judgment" and "judicial decision" are significant. Not just any decision counts as a judgment for purposes of a *res judicata analysis*. To be a thing *adjudicated*, a decision must be the product of a process closely analogous to a legal hearing before a court of law.

The hearing before the Association Board of Directors does not qualify. Whatever the virtues of a private hearing, even one with counsel and the opportunity to present evidence and cross-

examine witnesses, it does not satisfy the demands of the Due Process Clause when possession of a person's home is at stake. To see the fallacy of placing the Board's decision beyond judicial review, imagine the absurdity of allowing a state court to treat as "final and binding" a condominium association board's decision to exclude all blacks from residency, in violation of the 1964 Civil Rights Act. It is equally absurd to treat the Association's decision to evict the Spiegels as "final and binding."

B. *Due process*. The Association also claims that the "administrative hearings before the Association's Board of Directors," Br. Opp. at 7, satisfied the demands of due process. Again, the Association is mistaken. The process due under the Fourteenth Amendment must, in all events, satisfy the Court as being fair.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955).

Applying this standard to the instant case illustrates how the lower court proceedings lacked any semblance of constitutionality.[3] Due process requires not only a fair process,

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[3] Aside from our concerns with the due process accorded to the Spiegels below, the Association's eviction is tainted by questionable jurisdiction. Both in their petition for rehearing to the Appellate Court, Pet. Reh. at 5-9, and in their petition for leave to appeal to the Illinois supreme court, Pet. L. App. at 4-8, the Spiegels argued that the trial court lacked jurisdiction for two reasons.

but fair process "in a fair tribunal." *Id.* For that reason the Association's attempts to equate hearings before its Board of Directors with either an administrative hearing or with a court of law, *see* Br. Opp. at 7, fall flat. The Association's officers are not bound by oath to uphold the Constitution, as are federal and state officials. *See* U.S. CONST. art. VI. Hearings before the Board may have served certain administrative purposes for the Association, but they cannot be regarded as impartial; they make the Association a judge in its own cause, and permit it to make self-regarding decisions rather than public-regarding ones, in contrast to the duties that regularly fall on government officials. By any measure, therefore, the hearings afforded by the Association fall short of the requirements of due process.

First, the Forcible Entry and Detainer Act (FEDA), 735 ILL. COMP. STAT., 5/9-101 *et seq.* (West. 1992), as it appeared when the Association filed for an eviction, contained no provision authorizing a condominium association to evict tenants for a breach of covenant. And jurisdiction could not be implied, since FEDA is a statute in derogation of the common law, and Illinois courts have followed the rule of strictly construing jurisdiction thereunder. *See Bank of Belleville v. Stidmire*, 456 N.E.2d 175, 177 (Ill. App. Ct. 1983). Second, the Condominium Property Act contained no provision authorizing Illinois trial courts to entertain an action by a condominium association to evict a tenant for breach of covenant. This statutory lacuna was implicitly acknowledged by the Illinois legislature when it amended FEDA—after the Association brought the eviction action in this case—to provide jurisdiction in eviction cases brought by condominium associations. *See* 735 ILL. COMP. STAT., 5/9-102(a)(7) (West Supp. 1995).

CONCLUSION

The petition should be granted.

Respectfully submitted,

RONALD D. MAINES
(*Counsel of Record*)
R. SHAWN GUNNARSON
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

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